benefits whatever thereunder. This rule provides *inter alia* that the Commissioners may at their discretion direct the repayment to him of the whole or part of his contributions to the fund as the Commissioners shall in their absolute discretion shall think fit. Exercising that absolute discretion, the Commissioners have not thought fit to repay any sum to the plaintiff. The plaintiff now claims the amount which stood to his credit. It appeared to me that the whole question for the Court was whether the evidence proved that the plaintiff had been guilty of misconduct which involved pecuniary loss. On the evidence I found that he had, and that being so I held that it could not interfere with the absolute discretion of the Commissioners. I added that on the facts before me I might, if I had had the power, have inflicted a more lenient punishment than absolute forfeiture and qualified this by saying that possibly the Commissioners had other information on which they acted. I did not however palliate the misconduct of the plaintiff, which I characterised as being very gross. In weighing the evidence I carefully considered the fact that Counsel for the plaintiff refrained from calling him as a witness on his own behalf."

The case went to the Court of Appeal which allowed and ordered that judgment be entered for the plaintiff for $1,144.59. There was no written judgment and as one can only surmise the reasons which led the Court to allow the Appeal, this decision cannot be regarded as conclusive as to the several rights of a contributing member but it would seem to indicate that the Court took the view that a contributing member has an absolute right to repayment of such part of his contributions to the Fund as cannot be properly retained to make good losses sustained by the Commissioners by reason of his defalcations or misconduct. Put at its lowest the decision is consistent with the view that in the absence of any such losses the part of the fund made up of such contributions is the absolute property of the contributing member and on his bankruptcy vests in the Official Assignee. To hold otherwise would in my opinion be grossly inequitable. The contributing member in effect uses the fund as his savings bank with which he deposits each month part of his salary with the pleasing knowledge that if he behaves himself he will get 100% interest in the form of the donation added by the Corporation. If these savings were deposited with an ordinary bank they would be available for his creditors in the event of his bankruptcy and I can see no reason why, in the absence of any clear legislative enactment to the contrary, any distinction should be drawn in the case of savings deposited with the Corporation. An employee who required the whole of his salary to maintain himself might borrow each month in order to be able to make his contribution to the fund. It would be clearly most unfair if when he became bankrupt he could be allowed to turn round and say to the lender "You cannot touch these contributions which were really made up of moneys lent by you merely because they have been kept by the Corporation in this Provident Fund."

I wish to make it clear that I am only deciding what is the position as regards the part of the fund made up of contribution when such moneys become payable to the contributing member under Rule 13, that is upon his ceasing to be employed. No argument was addressed to me as to what the position as regards this part of the fund would be if a contributing member became bankrupt and continued to be employed and I express no opinion on that point which does not arise in the present case.

I direct that subject to costs such moneys as are in the hands of the Official Assignee having been paid out of the part of the fund comprised of contributions from salary are available for paying a further dividend.

Order accordingly.

Solicitors for the Petitioning Creditor—
Cheng Ean & Soon Chee.

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, J.

December 4, 1934.

REX vs. LEE SIONG KIAT.

[SINGAPORE MAGISTRATE'S APPEAL No. 42 of 1934]

Partnership—Relationship between partners—Criminal Breach of Trust by partner—Constructive possession of monies.

The relationship between partners is such that one of them may be entrusted with property on behalf of the partnership and may accordingly commit criminal breach of such trust within the meaning of the Penal Code. Criminal breach of trust can be committed with respect to moneys only constructively in the possession of the accused.

Appeal from a decision of the District Judge who convicted the accused on three charges of criminal breach of trust. Apart from the facts set out in the Judgment reported below, the evidence established that the position with regard to the 2nd and 3rd charges was as follows. The Hock Hoe Hup Kee Kongsi had deposited with the K.P.M. a guarantee fund of $5,000 – on which the K.P.M. yearly paid the Kongsi the sum of $250/– as interest. This interest for the year 1932 was not paid to the accused in cash but was

set off against larger sums owing by the Kongsi to the K.P.M., the accused signing a receipt to the K.P.M. for this on behalf of the Kongsi, for which he was acting as manager and in which he was a partner. The accused never accounted to the Kongsi for this sum of $250/-.

Page, for Appellant

Adrian Clark, D.P.P., for the Crown.

The facts and arguments otherwise sufficiently appear from the Judgment.

Cur. Ad. Vult.

TERRELL, J.—This is an appeal from a decision of the District Judge who convicted the accused on the following charges:—

1. That he, between the 2nd day of July, 1932 and the 20th day of January, 1933, at Singapore, being entrusted with certain property namely $3,825 in cash, alternatively 225 K.P.M. deck passage tickets at $17 total value $3,825, being the property of the Hock Hoe Hup Kee Kongsi did commit criminal breach of trust in respect of such property and that he thereby committed an offence punishable under section 406 of the Penal Code.
2. That he, on or about the 12th day of February, 1932, at Singapore, being entrusted with certain property namely $250 – cash, being the interest for one year on a capital deposit of $5,000 /– made by the Hock Hoe Hup Kee Kongsi with the N. V. Koninklijke Paketvaart Maatschappij, did commit criminal breach of trust in respect of such property, and that he thereby committed an offence punishable under section 406 of the Penal Code.
3. That he, on or about the 1st day of February, 1933 at Singapore, being entrusted with certain property namely $250 – cash, being the interest for one year on a capital deposit of $5,000 – made by the Hock Hoe Hup Kee Kongsi with the N.V. Koninklijke Paketvaart Maatschappij, did commit criminal breach of trust in respect of such property and that he thereby committed an offence punishable under section 406 of the Penal Code.

The accused was the representative of eight firms who had formed a partnership under the name of the Hock Hoe Hup Kee Kongsi (hereinafter called the Kongsi) for the purpose of obtaining from the K.P.M. and retailing passenger tickets from Singapore to Amoy. The accused's firm, one of the eight partners, was Chop Tong Hiap Hin of which the accused was the managing partner. The books of the Kongsi were kept by one Li Se Hong under the supervision of the accused. Li Se Hong also kept the books of Chop Tong Hiap Hin.

The arrangements between the K.P.M. and the Kongsi are set out in written agreements, Exhibits B and BB dated the 30th June 1932 and the 23rd December 1932 respectively. The first agreement was for six months and the second for a year. Each agreement provided:—

> "The Company shall effect business and supply passenger tickets to the Kongsi of brokers exclusively through their representative Lee Siong Kiat."

Tickets were sold to the Kongsi at $17/- each less a commission of 4% on saloon tickets and of 7% on deck tickets. As from June 1932 however the K.P.M. also issued one free ticket for every 15 tickets paid for. This extra commission was not mentioned in either of the agreements which were signed by all the partners, and they all gave evidence that they knew nothing about the free tickets at the earliest January 1933. The possible exception is Ong Seng Hui who by a resolution of the Kongsi had to affix his signature to all documents as representative of the Kongsi in addition to the accused, and he did in fact countersign the receipts, Exhibits N1-15 given to the K.P.M. which showed the number of tickets purchased, the amount of the commission and the number of free tickets issued. But as he cannot read English, knowledge of the issue of the free tickets cannot be imputed to him merely from his signature on the receipts. He is also said to have written Exhibit 15 which appears to indicate that he knew all about the free tickets. The document refers to 10 voyages during which 149 free tickets were issued. It was produced by the accused and put to Ong Seng Hui in cross-examination, and seems to indicate that of the 149 tickets Ong Seng Hui took 48 and the accused 101. On the other hand the books of Ong Seng Hui's Chop, Ban Seng Chan, which were produced by Khaw Ni Su, a partner, show that the extra tickets which were obtained otherwise than through the accused were paid for in cash. Exhibit 15 is therefore by no means conclusive. If it is a genuine document and refers to the division of the free tickets between the accused and Ong Seng Hui to the exclusion of the remaining members of the Kongsi, it would only seem to incriminate Ong Seng Hui as participating in the fraud, and would not provide an avenue of escape for the accused.

During the period covered by the first charge the K.P.M. issued to the accused 225 free tickets. The manner in which the account was made out was, in the case of the passages booked by the

M/S Van Heutz on the 16th June 1932, as follows:— the Kongsi was billed separately for the saloon passages, but as regards the deck passages the gross amount due for 300½ tickets was $5,108.50. From this had to be deducted (see Exhibit Nl) the following sums:

4% commission on the saloon passages	$23.60
7% commission on 282½ tickets (the tickets actually paid for)	336.17
and a refund of the actual cost of 18 free tickets issued in respect of the 282½ tickets paid for	306.00
	$665.77

Deducting these items for which the accused gave a receipt signed by himself and Ong Seng Hui, there remained a balance of $4,442.73 which was the actual sum paid by the accused with the Kongsi's cheque to the K.P.M. The tickets for the remaining voyages were paid for on exactly the same principle.

Mr. Page argues that this proves that the Kongsi paid the exact amount which they ought to have paid and got the benefit of the $306/–, the rebate on the free tickets. This would have been correct if they had got the free tickets, but even Mr. Page cannot say what happened to the free tickets. He threw over the accused's own explanation, which was not however accepted, that the free tickets had been distributed in specie among the members of the Kongsi. He suggested that they were given back to the K.P.M., but to begin with the K.P.M. witnesses were never asked this question, though I am hardly surprised that they were not. It is quite inconceivable that a firm like the K.P.M. would complicate their books by making a gesture of issuing free tickets and then rendering the whole transaction illusory by taking them back again. The proposition has merely to be stated to be rejected.

The position as regards the Kongsi was as follows:—

Purchase of 282½ tickets at $17 ..		$4,802.50
Less commission on saloon tickets ..	$23.60	
Less commission on deck tickets ..	336.17	359.77
		$4,442.73

That is to say they were in exactly the same position as if there had never been any issue of free tickets, and accordingly received no benefit whatever from the rebate of $306/– shown in Exhibit Nl. I did not call on the D.P.P. to answer this point which appeared to me to be too clear for argument.

It was proved conclusively that the accused had misappropriated all the free tickets which were the property of the Kongsi.

This is all I need say as regards the facts relating to the first charge.

As regards the second and third charges, these relate to the interest for 1931 and 1932 on a sum of $5,000/– which was provided by the members of the Kongsi jointly and paid to the K.P.M. as security for payment for the tickets issued from time to time. The yearly interest amounted to $250/–. The interest for 1931 was received by the accused on the 12th February 1932 and he signed a receipt for it. It was, however, never entered in the Kongsi books, though it is alleged that it was entered in the Tong Hiap Hin books, the accused's books, on the 20th January, 1932, i.e. nearly a month before it was paid. There is no reason why it should appear in the Tong Hiap Hin books at all and if the entry shows anything it shows a previous intention to misappropriate this sum when paid. The fact that it appears in the Tong Hiap Hin ledger under the Kongsi ledger heading means nothing, as the money was never in fact transferred and the partners in the Kongsi would have no access to the accused's private books. It is clear that this sum of $250/– was misappropriated.

As regards the third charge it would appear that the interest for 1932 was not paid in cash but by way of set-off from an amount owing by the Kongsi to the K.P.M. and which the accused paid by his own cheque. The accused however signed a receipt for it. Mr. Page argued that the accused could not be charged with misappropriating this sum as it never got into his hands. In my opinion this argument is misconceived. The accused received the benefit of this sum exactly as if he had paid the larger sum to the K.P.M. and then received back the $250/– in cash. The money was appropriated as between the K.P.M. and the accused as a credit in favour of the accused; as between the accused and the Kongsi it was misappropriated, as it never got into the Kongsi's hands. (See also *Queen* v. *Baxter*, 5 Cox C.C. p. 302.)

As regards the facts therefore I am in entire agreement with all the findings of the learned District Judge.

But Mr. Page further argued that the conviction could not stand because a partner could never be convicted of criminal breach of trust, as under the English law of partnership, which is law in this Colony, a partner does not stand in a fiduciary relation to his co-partners, that accordingly there is no 'trust,' and there cannot be a criminal breach of a trust which is

not recognized in law. Mr. Page further argued that by virtue of Ordinance No. 111 (Civil Law) the criminal law of England relating to partners was also introduced into the Colony. Apart from the fact that the English statutes make special provisions for charges of theft and embezzlement being brought against partners in respect of the partnership property, I cannot accept this submission. In criminal matters the law in the Colony is provided by the Penal Code to the exclusion of English Common Law or English Statute Law. Ordinance No. 111 (Civil Law) as its name implies is exclusively concerned with civil law, and this is all that need be said.

As to the argument that a partner is not in a fiduciary position to his co-partners, this is no doubt correct in so far as he is not a trustee in the strict sense in which that word would be interpreted in a Court of Chancery. But the word 'trust' in the expression 'criminal breach of trust' as found in the Penal Code, is used in a far wider and more popular sense. A reference to sections 407, 408 and 409 makes this perfectly clear. In section 407 a person entrusted with property may be a carrier, wharfinger or warehouse keeper; in section 408 a clerk or servant; and in section 409, a public servant, merchant, factor, broker, attorney or agent. Not one of the people in these various categories could ordinarily be described as a trustee in Chancery proceedings. One has to remember what a partnership is. It is an association requiring the utmost good faith between the partners—"in societatis contractibus fides exuberet"—each partner owes a duty to his co-partners and each partner is entitled to have confidence in his co-partner and good faith towards him. Again in law every partner is an agent for the partnership and an agent is specifically referred to in section 409.

I have no doubt, therefore, on principle that the relationship between partners is such that one of them may be entrusted with property on behalf of the partnership and may accordingly commit criminal breach of such trust within the meaning of Penal Code.

As regards the authorities, they are rather scanty, probably because the proposition has never been contested. The only local case is *Haji Sahid* v. *Shaik Feroo*, 3 Kyshe p. 79. In that case the magistrate refused to convict under either sections 403 and 405 as the accused was a partner, and on appeal the Supreme Court reversed the findings as regards section 403 only. The Supreme Court did not convict under section 405 as there was an Indian decision—*In re Lal Chand Roy*, 9 Sutherlands W.R. p. 37 to the effect that a partner does not fall within section 405. The Indian decision has however long since been overruled in *Nrigendro Lall Chatterjee* v. *Okhoy Coomar Shaw*, 21 Sutherlands W.R. p. 59. In the more recent case of *Debi Prasad Bhagat* v. *Nagar Mull*, I.L.R. 35 Cal. p. 1108 decided in 1908 although the Court upset the conviction under section 405, it was purely on the facts and it was not argued that the charge would lie, nor is it so suggested in *Gour*, 4th Edn. Vol. II, p. 2115.

The fact is that in partnership cases it is more difficult to prove the offence of criminal breach of trust because *ex hypothesi* the accused has already a partial dominion over the property in question, and it is essential for the prosecution to prove that this limited dominion on behalf of the partnership has been converted into a personal dominion on the accused's behalf. When the person charged with misappropriating property has no right to the property at all, it is easy to infer that any possession is an unlawful possession. In the case of partnerships, however, the position is different. It may be merely a matter of account and that is in fact one of the defences submitted in the present case. That defence cannot however prevail in cases such as the present where the books and conduct of the parties show that the misappropriation has been complete, and that the property has passed from, or never entered into, the possession of the partnership, and has been misapplied by the accused for his own benefit.

As the first charge is in the alternative I would amend the conviction so as to cover the alternative charge only, i.e. that relating to the 225 deck tickets at $17. In other respects the convictions and sentences will be confirmed and the appeal dismissed.

Appeal dismissed.

Solicitors for the Appellant—*Allen & Gledhill,*

END OF THE STRAITS SETTLEMENT OFFICIAL REPORTS.